SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 72

RAYMOND J. FUNKHOUSER AND ELMER N. FUNKHOUSER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. J. FUNKHOUSER & COMPANY, APPELLANTS,

vs.

J. B. PRESTON, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

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IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

J. B. PRESTON COMPANY, INC., Plaintiff-Respondent,

against

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants-Appellants

[fols. 2 & 3] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

No. 14468-1929

NOTICE OF APPEAL

SIRS: Please take notice that the defendants Raymond J. Funkhouser and Elmer N. Funkhouser appeal to the Appellate Division of the New York Supreme Court in and for the First Department from a judgment entered in the above entitled action in favor of the above named plaintiff and against the above named defendants for the sum of Sixty thousand six hundred eighty-seven and 27/100 Dollars ($60,687.27) in the office of the Clerk of the County of New York on the 12th day of May, 1930, and from each and every part of said judgment on both questions of law and questions of fact.

Dated New York, May 16, 1930.

Yours, etc., George B. Greenough, Attorney for Defendants-Appellants, 60 East 42d Street, Borough of Manhattan, City of New York, N. Y.

[fol. 4] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

J. B. PRESTON COMPANY, INC., Plaintiff,

against

R. J. FUNKHOUSER and E. N. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants

COMPLAINT

The plaintiff complains of the defendants and alleges:

First. That the plaintiff is a domestic corporation and was organized in the month of January, 1922.

Second. That prior to the organization of the plaintiff, J. B. Preston from whom the plaintiff corporation was organized, was engaged in the business of mining, purchasing and selling slate and slate products in the Borough of Manhattan, City, County and State of New York, with offices at No. 258 Broadway, in the said Borough and City.

Third. That on or about January 23rd, 1923, the defendants, Raymond J. Funkhouser and Elmer N. Funkhouser were engaged in the business of mining, purchasing and selling slate and slate products with an office and place of business at Hagerstown, in the State of Maryland, under the firm name and style of R. J. Funkhouser & Company.

[fol. 5] Fourth. That heretofore and on or about the 23rd day of January, 1923, the plaintiff by its president acting for plaintiff and the defendant herein entered into a contract, in writing, copy of which is attached hereto, made a part hereof and marked Exhibit "A."

Fifth. That thereafter and on or about January 25th, 1923, and pursuant to the agreement set forth in paragraph "Fourth" herein, the plaintiff and the defendant above named entered into a contract in writing, which said contract is attached hereto and marked Exhibit "B" and made a part hereof.

Sixth. That heretofore and on or about the 25th day of March, 1923, the written agreement set forth in paragraph "Fifth" herein, was supplemented by an agreement, in writing, between the plaintiff and the defendant herein which said agreement is set forth herein, made a part hereof and marked Exhibit "C."

Seventh. That up to the beginning of this action, despite the repeated requests of plaintiff and the readiness of the plaintiff to sell and deliver, and despite the repeated promises of the defendant to order, the defendant wholly in violation of the aforesaid contracts, purchased from the plaintiff and the plaintiff delivered to the defendant a total of

only thirty-four thousand seven hundred eight and 56/100 tons of red slate, at the agreed price or a total of Two Hundred Twenty-five Thousand Six Hundred Five and 65/100 ($225,605.65) Dollars instead of Sixty thousand tons as agreed.

Eighth. That at all the times hereinbefore mentioned, the plaintiff has been ready and willing to sell and deliver to the defendants at the above stated price, the red slate provided for in the aforesaid agreement and at all the times prior to the commencement of this action, the plaintiff has per-
[fol. 6] formed all the promises and conditions on its part but that defendants have refused to order any more red slate from plaintiff as agreed.

Ninth. That the aforesaid agreement made by the defendants to purchase red slate from the plaintiff was intended by the plaintiff and the defendants, and such intention was a part of the consideration of the said agreement, to pay over to the plaintiff, as a part consideration for the settlement of certain law suits then pending on behalf of the plaintiff or its representative against the defendants, moneys to an amount equal to whatever profits the plaintiff might make on the contract to sell and deliver red slate to the defendants in the amounts stated in the said contract at the price agreed to.

Tenth. That by reason of the breach of contract hereinbefore alleged, the plaintiff has been damaged in the sum of Seventy-five Thousand Eight Hundred and Seventy-four and 32/100 ($75,874.32) Dollars.

For a second, separate and distinct cause of action, the plaintiff reallages all the allegations of his complaint hereinbefore alleged just as though the same were alleged in full herein and further alleges:

Eleventh. That contrary to the "Sixth" paragraph of the contract hereinbefore set forth and pleaded and marked Exhibit "B," the defendants financed the operation of a red slate mill known as "Sheldon Slate Products Company," located at Middle Granville, N. Y., by financing the aforesaid red slate mill and by becoming heavily financially interested in the aforesaid red slate mill and by patronizing the aforesaid mill for orders of red slate, thereby diverting orders for red slate contracted for by the defend-

[fol. 7] acts with the plaintiff herein, from the plaintiff to the aforesaid Sheldon Slate Products Company and that by reason of the aforesaid breach of contract on the part of the defendants herein, the plaintiff has been further damaged in the sum of Seventy-five Thousand Eight Hundred Seventy-four and 32/100 ($75,874.32) Dollars, through being deprived of the opportunity of making profits on red slate which the plaintiff was always ready and willing to deliver to the defendants but which said slate the defendants ordered and received from the aforesaid Sheldon Slate Products Company, all to the plaintiff's damage in the sum of Seventy-five Thousand Eight Hundred Seventy-four and 32/100 ($75,874.32) Dollars.

Twelfth. That by reason of the premises, there is now due and owing from the defendants to the plaintiff on the first cause of action, the sum of Seventy-five Thousand Eight Hundred Seventy-four and 32/100 ($75,874.32) Dollars and on the second cause of action, the further sum of Seventy-five Thousand Eight Hundred Seventy-four and 32/100 ($75,874.32) Dollars.

Wherefore plaintiff demands judgment against the defendants herein for the sum of One Hundred Fifty-one Thousand, Seven Hundred Fifty-eight and 74/100 ($151,758.74) Dollars damages, with interest on said sum from the 1st day of January, 1927, together with the costs and disbursements of this action.

Jeremiah A. O'Leary, Attorney for Plaintiff. Office & P. O. address: No. 220 Broadway, Borough of Manhattan, City of New York.

(Duly verified by J. B. Preston, President of Plaintiff Corporation, on January 3rd, 1928.)

[fol. 8] EXHIBIT "A" TO COMPLAINT

This agreement, entered into the 23rd day of January, 1923, by and between James B. Preston, 258 Broadway, New York City, party of the first part, and Raymond J. Funkhouser and Elmer N. Funkhouser, parties of the Second Part

Witnesseth: That, Whereas the said party of the first part now owns Five Hundred (500) shares of the Common Stock of The Tennessee Rock Products Company, a corporation in and of the State of Maryland, and, Whereas, the said Parties of the Second Part desire to acquire from said party of the First Part, the said Five Hundred (500) shares of the Common Stock of the Tennessee Rock Products Company, now, therefore, in consideration of the sum of $1.00, in hand paid, and in further consideration as set out hereafter, the said party of the first part hereby agrees to sell, assign and transfer to the party of the Second Part, the said Five Hundred (500) shares of the Common Stock of the Tennessee Rock Products Company, for the sum of Twenty Five Thousand ($25,000) Dollars Cash and Two Hundred Eighty (280) shares of the Preferred Stock of the Tennessee Rock Products Company.

And in further consideration of said purchase price, of the Parties of the Second Part, the Party of the First Part hereby agrees to surrender to the said party of the Second Part, the Fifty (50) shares of Common Stock in the Tennessee Rock Products Company issued to H. F. Shapiro and now held by the party of the First Part, and further agrees to assign and transfer to the Parties of the Second Part Fifty Five (55) Shares of the Common Stock of the [fol. 9] Standard Slate Products Co. now issued in the names of J. B. Preston and E. W. Edwards, and the said Party of the First Part does hereby further agree to dismiss, without recourse, the suits and indictments against the Tennessee Rock Products Company and R. J. Funkhouser and E. N. Funkhouser now pending in the Federal Court at Baltimore, Md., and the party of the First Part also agrees to dismiss in the same manner the suits he has caused to be issued against H. F. Shapiro in the Courts at New York City, and in further consideration of these covenants the party of the First Part agrees to assign to E. N. Funkhouser, the entire interest of J. B. Preston in the contract now existing between the Certain-teed Products Corporation, a corporation existing under the laws of the State of Maryland, and R. J. Funkhouser and J. B. Preston, regarding the purchase of certain stock in the Standard Slate Company.

And in consideration of these covenants, the Parties of the Second Part agree to deliver to the Party of the First Part, all of those One Hundred Fifty (150) Shares of the Common

Stock of the J. B. Preston Company now held by H. F. Shapiro, properly assigned to said Party of the First Part.

And in further consideration of these covenants, the Parties of the Second Part agree to execute a contract with the Party of the First Part, agreeing to purchase from said party of the First Part, Fifteen thousand (15,000) tons of Red Slate Granules, in approximately equal monthly shipments, conforming to Standard Specifications of the Roofing Industry, during the year 1923, and a like quantity per year for a period of three (3) years thereafter at a price of Six Dollars and Fifty ($6.50) Cents per ton f. o. b. cars Granville, N. Y. terms, Net.

[fol. 10] And the parties of the Second Part agree during the life of this contract not to engage in the manufacture of Red Slate or finance others in the manufacture thereof.

The Parties of the Second Part agree to give their moral support to the Party of the First Part to the end that he retain his contract with the Philip Carey Company covering Red Slate.

In witness whereof, Each Party hereto has affixed his signature, thereby agreeing and consenting to the covenants herein enumerated, on the day and date first above written.

J. B. Preston, Party of the First Part. R. J. Funkhouser, E. N. Funkhouser, Parties of the Second Part.

Witness: E. N. Funkhouser.
Witness: J. B. Preston.
Witness: R. J. Funkhouser.

EXHIBIT "B" TO COMPLAINT

This agreement, made and entered into this twenty-fifth day of January, 1923, by and between the J. B. Preston and Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office in the City of New York, N. Y., party of the first part, hereinafter referred to as the seller; and R. J. Funkhouser and E. N. Funkhouser, trading as R. J. Funkhouser and Company, having their principal office in the City of Hagerstown, Maryland, party of the second part, hereinafter referred to as purchaser.

[fol. 11] Witnesseth: That: Whereas, the Seller owns and operates Red Slate Quarries and Grinding Mills in the producing of Red Slate Granules, and

Whereas, the Purchaser desires to procure Red Slate Granules for certain manufacturers in the Roofing Industry;

Now, Therefore, in consideration of the sum of One ($1.00) Dollar, the receipt of which is hereby acknowledged, the parties hereto mutually agree, subject to the covenants and conditions hereinafter set forth, as follows:

1. The Seller hereby sells and agrees to ship at the direction of the Purchaser, and the Purchaser hereby purchases from Seller Fifteen Thousand (15,000) tons of Red Slate Granules during the year of 1923, and a like quantity each year thereafter for an additional period of three (3) years, said Red Slate Granules to conform to the standard specifications of the Roofing Industry.

2. It is understood and agreed by the parties hereto that the quantity of Red Slate specified heretofore will be requisitioned in approximate equal monthly tonnage, although it is mutually understood that the Purchaser will require and the Seller agrees to furnish a larger tonnage during the Spring and Summer months than during other months of the year.

3. It is understood and agreed by the parties hereto that the price to be paid by the Purchaser to Seller for the said Red Slate Granules will be $6.50 per ton of Two Thousand (2,000) lbs. f. o. b. cars Granville, N. Y., terms net cash ten (10) days from date of shipment.

4. It is agreed by the parties hereto that this agreement shall be binding upon the successors or assigns of each of the parties hereto.

[fol. 12] 5. It is mutually agreed by the parties hereto that neither party shall be held responsible for any losses resulting if the fulfillment of any terms or provisions thereof shall be delayed or prevented by revolutions or other disorders, wars, acts of enemies, strikes, fires, floods, acts of God, or without limiting the foregoing by any other cause not within the control of the party whose performance is interfered with, and which by the exercise of reasonable dili-

gence, said party is unable to prevent, whether of the class of causes hereinbefore enumerated or not.

6. It is mutually understood by the parties hereto that, whereas, the Purchaser has had, heretofore, plans for the development of a Red Slate Granules Mill, the said Purchaser will not operate or assist by financing the operation of a Red Slate mill, providing the Seller arranges to supply to Purchaser at least Fifteen thousand (15,000) tons of red slate granules per year during the period covered by this contract.

7. This contract anticipates the discontinuance of the operation of the mill of the Standard Slate Products Company after April 1st, 1923, providing the Seller is able to supply at all times, the requirements of Red Slate Granules on the part of the Purchaser.

In witness whereof each of the parties hereto have executed this agreement this twenty-fifth day of January, 1923.

J. B. Preston Company, Inc., by J. B. Preston. R. J. Funkhouser & Company, by R. J. Funkhouser.

Witness: F. J. Rubidge.
Witness: F. J. Rubidge.

[fol. 13] EXHIBIT "C" TO COMPLAINT

Supplemental agreement entered into this twenty-fifth day of March, 1923, by and between J. B. Preston Company, Inc., party of the first part, and R. J. Funkhouser and E. N. Funkhouser, trading as R. J. Funkhouser & Co., party of the second part, and supplementing agreement between the same parties dated January 25th, 1923.

Whereas, there has been a general reduction in the price of red granules beginning January 1, 1924 to $6.62½ per ton net thirty days, or $6.50 net ten days, and

Whereas, the party of the second part is desirous of securing a reduction for the year 1924 in the contract price agreed upon in contract of January 25, 1923, and

Whereas, the party of the first part is desirous of securing a higher price than the contract price agreed upon in

case the general market price should return to or go above the price in effect January 25, 1923.

This supplemental agreement witnesseth:

In consideration of one dollar ($1.00) each party to the other party paid, the receipt of which is hereby acknowledged, and for other good and valuable consideration, the parties hereto agree as follows:

(1) That the party of the first part will make the following price reduction to party of the second part on red slate granules shipped under the contract above mentioned during the year 1924.

(a) On the first 5,000 tons shipped the reduction will be 2% of the January 25, 1923, contract price.

[fol. 14] (b) On the second 5,000 tons shipped the reduction will be 4% of said contract price.

(c) On the third 5,000 tons shipped, which may be shipped on order of party of the second part, the reduction will be 6% of said contract price.

(d) On any amount shipped in excess of 15,000 tons during the year, the reduction will be $1.00 per ton from the said contract price.

The above reductions to apply on all shipments made since January 1, 1924, and payments heretofore made by party of the second part in excess of the reductions made herein, may be deducted from the next invoices rendered by party of the first part.

(2) In the event that the general price of granules should in the year 1925 return to the level in effect on January 25, 1923, then for one year thereafter the party of the second part will pay to the party of the first part, Six and 50/100 ($6.50) Dollars per ton net thirty days or less 2% for ten days.

The concessions herein made by both parties shall not alter in any way any of the other conditions of the contract between the parties hereto dated January 25, 1923.

J. B. Preston Company, Inc. J. B. Preston, President. R. J. Funkhouser & Company. E. N. Funkhouser.

Witness: E. W. Edwards.
Witness: R. J. Bowers.

[fol. 15] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

ANSWER

The defendants by their attorneys, Marshall & Auchincloss, for their answer to the complaint in the above entitled action respectfully show to the Court and allege:

First. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs designated First and Second of the complaint.

Second. Deny each and every allegation contained in paragraph designated Third of the complaint, except that at or about the time alleged in said paragraph, admit that they were engaged in the business of purchasing and selling slate and slate products under the firm name and style of R. J. Funkhouser & Company with an office and place of business at Hagerstown, in the State of Maryland.

Third. Deny each and every allegation contained in paragraph designated Fourth of the complaint, except that defendants admit that at or about the time alleged in said paragraph, the defendants and J. B. Preston entered into a contract in writing, a copy of which marked Exhibit A is annexed to the complaint herein.

Fourth. Admit the allegations contained in paragraphs designated Fifth and Sixth of the complaint.

Fifth. Deny each and every allegation contained in paragraph designated Seventh of the complaint, except that defendants admit that at various times plaintiff delivered to [fol. 16] defendants a total of 34,708.56 tons of red slate at the agreed price as alleged in said paragraph Seventh of the complaint.

Sixth. Deny each and every allegation contained in paragraphs designated Eighth, Ninth, Tenth, Eleventh and Twelfth of the complaint.

For a first, separate and distinct counterclaim to the causes of action purported to be set forth in the complaint, defendants allege:

Seventh. Repeat and reallege each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth and Sixth hereof and incorporate the same in this paragraph by reference as if the same were fully set forth herein.

Eighth. That subsequent to the time of entering into the three contracts as alleged in the complaint and therein designated as Exhibits A, B and C and in accordance with the terms thereof, defendants herein at all times as provided for in said contracts were ready and willing to receive, offered to receive, and demanded of plaintiff the delivery of, the quantities of red slate granules as agreed upon in the contracts aforesaid, and offered to pay the plaintiff therefor in accordance with the terms of said contracts, but that the plaintiff failed, refused and neglected to make said delivery as demanded, except as alleged in paragraph Fifth hereof.

Ninth. That as a result of plaintiff's failure, refusal and neglect to make delivery as set forth in paragraph Eighth hereof, defendants at various times during the existence of the contracts aforesaid were compelled to purchase red slate granules to a total amount of 14,041.44 tons from parties other than the plaintiff and to pay therefor the sum of 25¢ per ton more than the price agreed upon in said con-
[fol. 17] tracts, and that as a further result thereof the profit of defendants on the resale of said red slate granules so purchased by defendants from parties other than plaintiff was correspondingly diminished by the sum of 25¢ per ton.

Tenth. That the defendants have duly performed all of the terms and conditions of the contracts designated in the complaint herein as Exhibits A, B and C on their part to be performed, except as performance has been prevented by reason of the facts set forth in paragraphs Seventh, Eighth and Ninth hereof.

Eleventh. That by reason of the foregoing as set forth in paragraphs Seventh, Eighth, Ninth and Tenth hereof, the defendants have been damaged in the sum of $7,020.72.

For a second, separate and distinct counterclaim to the causes of action purported to be set forth in the complaint, defendants allege:

Twelfth. Repeat and reallege each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth and Sixth hereof and incorporate the same in this paragraph by reference as if the same were fully set forth herein.

Thirteenth. That plaintiff and defendants entered into an agreement by the terms of which, in consideration of defendants entering into the contracts designated in the complaint herein as Exhibits A and B, the plaintiff agreed not to sell red slate granules direct to customers of defendants at a price lower than $7.50 per ton or at a price lower than that asked by defendants of the customers thereof; and that nevertheless and regardless of said agreement and in violation of the terms and conditions [fol. 18] thereof plaintiff did, on information and belief, knowingly and willfully and despite repeated and frequent protests from defendants, sell red slate granultes to customers of defendants in an amount totalling 11,250 tons at a price of $7.00 per ton, thereby depriving defendants of the profits to which the defendants were entitled, and giving to the plaintiff profits greater than those to which plaintiff was entitled by reason of the agreement in this paragraph referred to, and thereby further preventing plaintiff from delivering to defendants the quantity of red slate granules in accordance with the terms of the contracts designated in the complaint herein as Exhibits A, B and C.

Fourteenth. That the defendants have duly performed all of the terms and conditions of the contracts designated in the complaint herein as Exhibits A, B and C on their part to be performed, except as performance has been prevented by reason of the facts set forth in paragraphs Twelfth and Thirteenth hereof.

Fifteenth. That by reason of the foregoing as set forth in paragraphs Twelfth, Thirteenth and Fourteenth hereof, the defendants have been damaged in the sum of $11,250.00.

For a separate, distinct and complete defense to the causes of action purported to be set forth in the complaint, defendants allege:

Sixteenth. Repeat and reallege each and every allegation contained in paragraphs First, Second, Third, Fourth,

Fifth and Sixth hereof and incorporate the same in this paragraph by reference as if the same were fully set forth herein.

Seventeenth. That never during the first three years of the existence of the contracts designated in the complaint [fols. 19 & 20] herein as Exhibits A, B and C did the plaintiff complain of, or object to, the quantity of red slate granules purchased by the defendants from the plaintiff, even though in no one of said three years did defendants purchase from plaintiff as much as 15,000 tons of said granules, but on the other hand plaintiff accepted without complaint or objection payments from defendants for the quantities of said granules purchased by defendants from plaintiff, thereby waiving so much of the terms and conditions of said contracts as provided for the purchase by defendants of 15,000 tons of said granules a year during the existence of said contracts.

Wherefore defendants demand judgment dismissing the complaint herein and an affirmative judgment against the plaintiff in the sum of $18,270.72 together with the costs and disbursements of this action.

Marshall & Auchincloss, Attorneys for Defendants. Office & Post Office address: 50 Broadway, Borough of Manhattan, New York City.

(Duly verified by Defendant, R. J. Funkhouser.)

[fol. 21] In Supreme Court of New York, Trial Term—Part 3

No. 16

Extract from Clerk's Minutes—April 24th, 1931

Findings waived.

Both sides stipulated that the Court direct a verdict with the same force and effect as though a Jury were present.

J. B. PRESTON COMPANY, INC.,

against

R. J. FUNKHOUSER and E. W. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company

I hereby certify that this cause was tried before Hon. Alfred H. Townley, without a Jury, on the 7th, 8th, 9th, 10th, 15th, 22nd, 23rd, 24th, 25th, 28th, 29th and 30th days of April and the 1st, 2nd and 5th days of May, 1930, and a verdict rendered therein by direction of the Court for the plaintiff for the sum of $45,789.70 with interest amounting to the sum of $14,281.57 making a total of $60,071.27 and counterclaims dismissed. 30 days' stay of execution after notice of entry of judgment. 60 days to make a case on appeal allowed.

[fol. 22] May 12, 1930.—Plaintiff's motion for an extra allowance denied.

By order of Mr. Justice Townley, dated May 12, 1930, ordered that the Clerk's minutes be amended in the following respects. Verdict directed for the plaintiff for the sum of $45,889.70, interest in the sum of $14,417.57 making a total of $60,307.27.

That the name of the defendants herein shall be entered as Raymond J. Funkhouser and Elmer N. Funkhouser.

Daniel E. Finn, Clerk.

[fol. 23] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

JUDGMENT

The issues in this action having been duly brought on for trial before Mr. Justice Alfred H. Townley, without a Jury, at a Trial Term of this Court, Part III thereof, held on the 7th, 8th, 9th, 10th, 15th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th, and 30th days of April, 1930 and the 1st, 2nd and 5th days of May, 1930, and the parties having appeared by counsel, and the issues having been duly tried and a jury trial having been waived by stipulation and findings hav-

ing been waived and both sides having stipulated that the Court direct a verdict with the same force and effect as though a jury were present and a verdict for the plaintiff having been duly rendered by direction of the Court, on the 5th day of May, 1930, for the sum of Sixty Thousand Three Hundred Seven and 27/100 ($60,307.27) Dollars and the counterclaim of the defendants having been dismissed and the costs of the plaintiff having been duly taxed in the sum of $329.75,

Now, on motion of Jeremiah A. O'Leary, attorney for the plaintiff, it is

Adjudged that the plaintiff J. B. Preston Company, Inc., recover of the defendants Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, the sum of Sixty Thousand Three Hundred Seven and 27/100 ($60,307.27) Dollars, with interest thereon from the 5th day of May, 1930, in the sum of $50.25, together with the sum of $329.75 costs as taxed, making in all the aggregate sum of Sixty Thousand Six Hundred Eighty-seven and 27/100 ($60,687.27) Dollars and that it have execution therefor.

Dated May 12th, 1930.

Daniel E. Finn, Clerk.

[fol. 24] In Supreme Court of New York

Order Correcting Interest on Judgment—May 12, 1930

Upon reading and filing the annexed stipulation, dated May 9th, 1930, it is

Ordered that the Clerk's Minutes and the record of the trial and the case in the above entitled action be amended in the following respects:

1. That the amount of damages as estimated by the Court in its opinion and direction of the verdict, be changed from $45,789.70 to $45,889.70;

2. That the amount of interest on the verdict as estimated by the plaintiff and directed by the Court, be changed from $14,281.57 to $14,417.57;

3. That the total amount of the judgment after the aforesaid changes and corrections have been made, be entered in the sum of $60,307.27;

4. That the names of the defendants herein shall be entered as Raymond J. Funkhouser and Elmer N. Funkhouser;

5. That the plaintiff's costs and disbursements be taxed in the sum of $329.75;

6. That the judgment be entered herein without further notice.

Enter.

A. H. T., J. S. C.

[fol. 25] IN SUPREME COURT OF NEW YORK

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. O'Leary: We rest.

(The income tax returns previously considered were produced and marked Defendant's Exhibits V, W, X and Y respectively.)

The Court: Can you gentlemen agree as to the actual quantities that were short in each one of the years 1924, 1925, and 1926? If I remember there was some confusion in the figures, particularly with reference to 1923.

Mr. O'Leary: I think we are very close together on that. Our claim is that in 1923 there were 4,822 tons shipped. Their claim is the same.

The Court: What do you claim the shortage was in 1923?

Mr. O'Leary: 10,178 tons. They are in agreement with us on that.

The Court: Then you are agreed that the shortage for 1923 was 10,178?

Mr. O'Leary: Correct.

The Court: What are the figures for 1924?

Mr. O'Leary: In 1924, our claim is 12,034. Their claim is 12,037 tons. We are three tons off. We will take their figures for 1924.

The Court: That makes a shortage of how much?

Mr. O'Leary: 2,963 tons.

The Court: 1925?

Mr. O'Leary: In 1925, we have agreed on 8,115 tons as the tonnage delivered in 1925. That leaves a balance of 6,885 tons for 1925.

The Court: 1926?

[fol. 26] Mr. O'Leary: 1926, we have a discrepancy of 67 tons and we contend that that 67 tons discrepancy is accounted for by the fact that in the defendant's estimate they have included two cars of slate flour which was shipped to Akron, Ohio, and that our figures are correct.

The Court: Your figures of shortage are how much?

Mr. O'Leary: 5,340 tons.

The Court: And their figures are what?

Mr. O'Leary: 5,277. We will split that with you if you want to. Can't we reach an agreement on that?

(Colloquy off the record.)

Mr. O'Leary: We have agreed on 1926. It will make our figures 9,693 instead of 9,660.

The Court: That will make the shortage how much?

Mr. O'Leary: 5,307 tons.

The Court: That makes a total, according to my figures of 25,333. Do I understand now that both sides rest?

Mr. Kaylor: Yes.

Mr. Grenough: I renew my motion made at the close of the plaintiff's case for a dismissal of the plaintiff's complaint on the entire proof, for failure to prove a cause of action against the defendants; for failure to prove ability to carry out the entire contract on the plaintiff's part, and on the ground that even should the Court decide that the defendants were guilty of breach of contract, that there have been no damages sustained in this case, because the measure of damages, we contend is the difference between [fol. 27] the contract price and the market price; and in this case the testimony of all witnesses was that the market price was considerably above the contract price, being $7.50 during the years 1923, 1925 and 1926, and $6.62 during the year 1924.

The Court: And in the alternative, you move for a direction of a verdict in favor of the defendants.

Mr. Greenough: Yes, sir.

The Court: I assume the plaintiff moves for a direction of a verdict in favor of the plaintiff.

Mr. O'Leary: Yes; and I also desire to move at this time, in view of the record that was made on the defendant's cross examination, the concession that was made, for

a formal dismissal of the counter-claim set up in the defendant's answer.

The Court: That motion will be granted and the counter-claim will be dismissed on consent of the defendant. That is out.

IN SUPREME COURT OF NEW YORK

OPINION

It is conceded in this case that the defendants failed to order the quantities called for by the contract in any of the four years that it was in force.

In 1923, this shortage amounted to 10,178 tons: in 1924, to 2,963 tons; in 1925 to 6,885 tons; and in 1926 to 5,307 tons; making a total shortage during the four years of the contract of 25,333 tons.

The defendants attempt to justify their failure to take the stipulated quantities upon the claim that the plaintiffs failed to make prompt delivery of merchandise ordered [fol. 28] and that the merchandise delivered was defective.

In my opinion, neither of these claims can be sustained.

The schedule, Exhibit 9, shows in detail the shipping record of each order; and it shows that substantially 80 per cent of the merchandise ordered was delivered on the exact date fixed for delivery; substantially 12½ per cent was shipped within five days of the shipping date; and that only 7½ per cent was more than five days late.

The evidence clearly shows that these delays were due almost entirely to causes beyond the plaintiff's control, one of the principal of which was the inability to get cars from the railroad company.

The way in which defendants sent in their orders was a very definite, contributing factor to such delays.

The contract called for the orders to be fairly uniform over each month. Defendants never observed this provision of the contract.

The schedule marked Exhibit 54 clearly illustrates this. In some months in 1926, for example, the orders for one month would be about 700 tons; the next month they would be 1,500 tons; and then they would drop back to six or seven hundred tons the month following.

No estimate of defendant's probable requirements was given in advance so that plaintiff could not arrange a schedule of operation or make necessary arrangements with the railroad company to have allocated to it the number of cars required to meet this demand.

Plaintiff in my opinion not only made substantial compliance with defendant's orders in point of time, but under the conditions existing did unusually well.

[fol. 29] The claim of defect in material furnished in my opinion is equally unsubstantial.

A complete answer to these complaints would seem to be found in the fact that no merchandise shipped was ever returned and defendants accepted and paid for everything that they received up to the end of the contract.

Such complaints as were made with respect to quality of merchandise shipped were infrequent in time and unsubstantial in amount of merchandise involved and were always adjusted by some agreement between the parties.

It is hardly conceivable that had the complaints as to quality, made in 1923 for instance, had any substance, the defendant would have continued to order merchandise for each of the remaining years of the contract.

At the time when the plaintiff insisted that orders be given for the balance of the merchandise called for by the contract, in no instance was any claim asserted by the defendant to the effect that their failure to place orders for the balance of the merchandise was justified by reason of the plaintiff's failure to promptly deliver what had been ordered or by reason of any defect in the quality of the merchandise which had been delivered.

The defendants received every ton of merchandise that they ordered and accepted and paid for all they received.

How any substantial claim of either delay in delivery or defect in quality can survive is hard to understand.

In the early part of 1924, the defendants made a contract with another corporation in which they had some interest. Under that contract they took from this other concern, during the life of this contract, a quantity of red slate granules, the same commodity called for by this contract, in quan-

[fol. 30] tities which had they been taken from these plaintiffs, would have more than met their obligations under the contract in suit.

On the record before me, I am convinced that these defendants have failed to meet their obligations under the contract in suit; and I am forced to find that they have broken this contract and must respond to the plaintiff in the damage resulting therefrom.

The question of damages has been very bitterly contested throughout this trial. In fact, probably the greater part of this voluminous record is made up of testimony and mathematical computations directed to that question.

The question is not entirely free from difficulty. Defendants claim the measure of the plaintiff's damage is the difference between the contract price and what it claims to have been the market price for the commodity that was the subject of this contract during its life.

The so-called market price represented a price at which during the term of this contract slate granules were sold by manufacturers to the roofing trade in what might be called retail sales.

The sale, which was the subject of this contract, was not that type of transaction at all. It was a transaction in which the defendants were not bargaining for the sale of an existing commodity, but the plaintiffs undertook to manufacture, at the defendant's demand, quantities of merchandise which it called for.

Considering the nature of this contract, it is obvious that the parties understood that the product was to be manufactured to meet defendant's demands indicated by orders and that in case defendants failed to order, plaintiff would not manufacture, and its loss would be its profit represented by the difference between the cost to them of [fol. 31] manufacturing the product and what they were to receive under the contract.

That this was the understanding of the parties is further indicated by the fact that the contract price was, at the time the contract was made and during its entire life, considerably below the so-called market price which represented the price at which the defendants would resell the merchandise to the roofing trade, and had no application to a contract such as this.

Certainly, these plaintiffs were under no obligation to manufacture these goods which were not ordered and attempt to sell them to someone else in order to minimize the

damage resulting from the defendant's breach of its contract.

The proper measure of damages, under the peculiar circumstances of this contract, I am convinced, was the difference between the contract price and the cost to plaintiffs of manufacturing the merchandise to be delivered.

The view expressed, in my opinion is sustained by the leading cases of Todd against Gamble (148 N. Y. 382) and Oswego Falls Pulp & Paper Company v. Stretcher Lithographing Company (215 N. Y. 98).

The question of what elements should be included in computing the cost of manufacturing what the defendants failed to order has been the subject of much discussion during the course of this trial. The controversy relates primarily to the question of whether general overhead and depreciation should be included in the cost of manufacture, or whether such cost should be restricted to the actual additional cost to the plaintiff of producing the additional merchandise which defendants failed to order and which in fact was never manufactured.

[fol. 32] If the question were presented to me free from the embarrassment of what appears to be controlling authority (Snell v. Remington Paper Company, 102 Appellate Division 138), I should have no hesitancy in holding that executive overhead and depreciation, which are fixed charges against the business and which of necessity have been paid by the manufacturer out of the business done, cannot again be charged as an expense in computing the additional manufacturing cost involved in the production of goods contracted for but never ordered and never in fact manufactured. To charge such items in such a computation would in my opinion require a manufacturer to pay this expense twice; once out of the business actually done and once as a charge against the business ordered and never carried out.

Plaintiffs, however, in view of the apparent rule to the contrary laid down in Snell against Remington Paper Company, have consented that they be included and I have accordingly charged them in as a part of the cost of manufacturing the balance of the merchandise called for by this contract.

Plaintiffs have prepared from their books a statement of manufacturing costs, which has been marked Plaintiff's

Exhibit 21. This statement has been vigorously attacked by defendants, but in my opinion, the evidence shows it to be substantially correct except for the year 1923, when, owing to a destruction of part of the records for that year, it understates the manufacturing cost.

In my opinion, the total cost of manufacturing the balance of the red slate granules called for by this contract, including overhead and depreciation, would have been $4.50 a ton for the years 1923, 1924 and 1925; and in the year 1926, there was for various reasons a decided increase in cost, which I will fix at 90 cents a ton, making the cost [fol. 33] per ton for that year $5.40. The contract price was $6.50 a ton, making the loss per ton in 1923, 1924 and 1925, $2, and for 1926 $1.10 per ton.

Applying these figures to the quantities not taken in the various years of the contract shows the loss for 1923 to have been $20,256,

In 1924	$5,926.00
In 1925	13,770.00
In 1926	5,837.70,
making a grand total of	$45,799.70

to which should be added interest on $20,256 from December 31, 1923; on $5,926 from December 31, 1924; on $13,770 from December 31, 1925; and on $5,837.70 from December 31, 1926.

If counsel will make the necessary computation, I will direct a verdict for that amount.

Mr. O'Leary: My interest figures are $14,281 and 57 cents.

The Court: The interest has been computed to amount to $14,281.57. That makes a total of $60,071.27. A verdict will be directed for the plaintiff for $60,071.27. When you come to review the interest computation, should you find that any mistake has been made, either side may call my attention to it.

Mr. Greenough: There is one thing we would like to have on the record. In the cleanup of the calendar a year ago, this case was on the calendar and it was overlooked by the defendant's attorney who was handling it at that time and an inquest was taken. I then was substituted and

appeared and opened the default. At that time a bond for $160,000 was put up to open the default.

Now I would like to have an order made directing that upon the filing of the appeal bond in this case, that the other bond be vacated.

[fol. 34] Mr. O'Leary: It won't be necessary. We will do it willingly by consent.

Mr. Greenough: It becomes due in ten days.

Mr. O'Leary: We will do anything we can to facilitate that.

Mr. O'Leary: I have a motion to make, if your Honor please. In view of the fact that this has been a very long and arduous case requiring tremendous preparation and tremendous trial work, I move for an additional allowance of five per cent on behalf of the plaintiff.

The Court: The motion will be denied.

(Thirty days' stay and sixty days to make a case.)

[fol. 35] PLAINTIFF'S EXHIBIT 17

April 23, 1927.

Mr. R. J. Funkhouser, president R. J. Funkhouser & Co.,
Canadian Pacific Building, New York, N. Y.

DEAR MR. FUNKHOUSER: You will recall my informing you a year ago that the matter of handling and looking after fulfilling of the contract made by you some years ago, covering 60,000 tons of red slate to be purchased from our [fol. 36] Company, was largely taken out of my hands and placed in the hands of our attorneys.

Pursuant to their advice, I have found it necessary to refrain from calling on you or taking the matter up regarding further shipments until, by your actions, you have indicated whether or not you were breaching this contract.

You will recall a year ago that you gave a verbal promise to our attorney, Mr. Roderick Begg and to myself, that you would take every ton of slate you had contracted for, even if it meant your doing so at a loss, and at that time we informed you that we would bring no pressure to bear as regards the completion of this contract within the allotted time, and would be satisfied, providing you continued shipments in the same manner as heretofore.

You will also recall that you have repeatedly assured me, since that time, that you would do this particular thing.

Our attorneys are now preparing a breach of contract and damage suit against your Company, in the amount of $100,000, and as the matter now stands service will shortly be taken against you in connection with this suit. You are very well familiar with the fact that I have made every endeavor to deal with you in an amicable way and that even now I would much prefer to see some satisfactory adjustment on your part rather than having this matter go to suit.

I am leaving for Atlanta, Ga., to-day and according to present plans will be back here on either Thursday or Friday of next week.

Yours very truly, J. B. Preston, Co., Inc., ——, President.

JBP/ATK.

[fol. 37] PLAINTIFF'S EXHIBIT 18

R. J. Funkhouser. E. N. Funkhouser

R. J. Funkhouser & Co.

General Offices

501-512 First National Bank Building

Hagerstown, Maryland

New York City

Chicago Office: 1120 Conway Building; Phone: Main 2798. New York Office: 630 Canadian Pacific Bldg.; Phone: Murray Hill 9406

April 27th, 1927.

J. B. Preston Company, Inc., 345 Madison Avenue, New York City.

Attention of Mr. J. B. Preston

GENTLEMEN: We have your letter of the 23rd. Note that your attorneys are now preparing a breach of contract

and damage suit against our Company. I can say in this connection, that this is your privilege.

Our feelings are you don't have any grounds upon which to base your claim. In fact, you breached the contract about three years ago, but notwithstanding we were inclined to continue to give your Mill Red tonnage.

I want to say with reference to the statement you have made in the third paragraph of your letter, that you have not properly quoted the statement made to Mr. Begg. I did state that we would take the balance of the tonnage and dispose of it at a loss if you were inclined to force us to do so, but that we would sell it to your own customers at any price we may be able to get.

[fol. 38] I hardly think for a minute, Mr. Preston, that you can, in a court of equity, establish a damage claim against us for not taking a certain tonnage of Red Slate, when it can be proven without a question of doubt, that the said tonnage was produced at your Mill and shipped to the customers billed direct by you, which otherwise would have been shipped for our account, and at the same time you probably received $.50 more a ton net than if shipped on our account. Aside from this, you were not justified under the arrangements we had with you to go out in the market and sell Slate at a lower price, and particularly to our established customers.

Crediting our account with a tonnage you shipped to Watson and Logan-Long during the life of the contract, we have taken a greater tonnage than the amount called for in the contract. We have always considered that we have lived up to our moral and legal obligations in connection with this contract.

If you think we have not, we are entirely willing that the exact situation be established by a court of equity.

Yours very truly, R. J. Funkhouser & Co., by R. J. Funkhouser.

RJF:PS.

[fol. 39] PLAINTIFF'S EXHIBIT 21

Heller Audit Company

Martin G. Heller, Certified Public Accountant

April 20, 1929.

J. B. Preston Company, Inc., 122 East 42nd Street, New York, N. Y.

GENTLEMEN: As per your instructions, we have drawn up from your records at the General Office, 122 East 42nd Street, New York, N. Y., four separate statements covering the years 1923, 1924, 1925 and 1926, showing cost of producing red slate roofing granules, at your mill, located at Granville, New York, for respective years. We have shown separately the producing cost of material, inasmuch as items such as salary of local manager, bookkeeper, superintendent, foreman, also taxes, insurance and general overhead would have been the same had orders and production increased.

With quarrying, milling, and production cost, it is necessary to assume these items would increase in ratio to increased tonnage, although in actual practice there is a lower tonnage production cost as volume increases.

The loss suffered through failure to receive additional orders, is represented by the difference in sales price received for material and the cost of producing same.

The statements, as mentioned above, are herewith attached in the form of Exhibits, as follows:

Exhibit "A"—Covers the Year 1923.
Exhibit "B"—Covers the Year 1924.
Exhibit "C"—Covers the Year 1925.
Exhibit "D"—Covers the Year 1926.
Exhibit "E"—Covers total of the four-year period.

Respectfully submitted.

Heller Audit Company, by M. G. Heller, Certified Public Accountant.

[fol. 40]

EXHIBIT "A"

1923

Cost of Production

Granville, N. Y.

J. B. Preston Company, Inc.

Quarrying and Milling Cost, Including Labor:		
Quarrying, including labor	$23,216.18	
Milling, including labor	20,166.67	
Trucking	3,940.96	
Hauling	24.15	
Storage and loading	3,454.45	
Auto repairs, supplies, miscellaneous	880.40	
Total		$51,682.81
Administrative and Miscellaneous Expense:		
Miscellaneous supplies	$483.21	
Fire insurance	1,867.59	
Salaries	6,251.36	
Miscellaneous	372.11	
Legal expense	114.22	
Taxes	250.02	
Total		9,338.51
Total cost		$61,021.32

[fol. 41]

Total cost per ton, including overhead [tons produced, (11,973) 17,726]		($5.096)	$3.442
Producing cost per ton		(4.316)	2.916
Administrative and miscellaneous cost per ton		(.780)	.526
Funkhouser contract orders	Tons	15,000.00	
Orders received from Funkhouser	"	(4,030.75)	4,822.00
Shortage on contract orders from Funkhouser	"	(10,969.25)	10,178.00
Contract price on Funkhouser orders		$6.500 per ton	
Producing cost		(2.916) " "	$2.916
Loss per ton		($3.584) " "	3.584
Loss account failure to take contracted material, (10,969.25). 10,178 tons @ ($2.184) 3.584 per ton		($23,956.84)	$36,477.95

NOTE.—Figures in parentheses are figures on original exhibit.

[fol. 42]

EXHIBIT "B"

1924

Cost of Production

Granville, N. Y.

J. B. Preston Company, Inc.

Quarrying and Milling Cost, Including Labor:		
Quarrying, including labor	$28,572.83	
Milling, including labor	24,498.44	
Gasoline and storage	761.62	
Compensation insurance	3,706.90	
Freight	147.22	
Trucks and teams	4,329.04	
Hauling	506.75	
Penalty	117.62	
Storage and loading	4,503.72	
Repairs	650.96	
Auto supplies	237.40	
Miscellaneous	197.03	
Total		$68,229.53
Administrative and Miscellaneous Expense:		
Fire insurance	$2,316.67	
Salaries	6,380.00	
Miscellaneous	1,378.91	
Total		10,075.58
Total cost		$78,305.11

[fol. 43]

Total cost per ton, including overhead (tons produced, 20,347)		$3.848
Producing cost per ton		3.353
Administrative and miscellaneous cost per ton		.495
Funkhouser contract orders	Tons	15,000.000
Orders received from Funkhouser	"	12,033.755
Shortgage on contract orders from Funkhouser	"	2,966.245
Contract price on Funkhouser orders		$6.500 per ton
Producing cost		3.353 " "
Loss per ton		$3.147 " "
Loss account failure to take contracted material, 2,966.245 tons @ $3.147 per ton		$9,334.77

Supplement to Exhibit "B"

J. B. Preston Company, Inc.

Credit Memorandum to R. J. Funkhouser & Company Per Supplemental Agreement Entered Into March 25, 1924—Exhibit "C"

(a) 5,000 tons red granules @ $6.50 per ton.	Reduction 2%	$650.00
(b) 5,000 tons red granules @ $6.50 per ton.	Reduction 4%	1,300.00
(c) 5,000 tons red granules @ $6.50 per ton.	Reduction 6%	1,950.00
Total		$3,900.00

[fol. 44]

EXHIBIT "C"

1925

Cost of Production

Granville, N. Y.

J. B. Preston Company, Inc.

Quarrying and Milling Cost, Including Labor:

Quarrying, including labor	$33,683.97	
Milling, including labor	29,272.65	
Road maintenance, hauling and supplies	465.70	
Storage and loading	3,867.03	
Trucks and teams	4,873.11	
Gasoline and storage	1,320.49	
Compensation insurance	2,382.83	
Auto repairs	84.00	
Auto supplies	254.83	
License	15.00	
Miscellaneous labor	1,015.68	
Miscellaneous supplies	153.08	
Freight and express	38.59	
Total		$77,426.96

Administrative and Miscellaneous Expense:

Fire insurance	$2,497.16	
Telephone and telegraph	378.29	
Postage	42.83	
Miscellaneous	154.92	
Printing and stationery	22.94	
Travelling	182.72	
Interest	291.10	
Taxes	778.32	
Legal expense	43.00	
Advertising	434.54	
Salaries	7,042.50	
Total		11,868.32
Total cost		$89,295.28

[fol. 45]

Total cost per ton, including overhead (tons produced, 23,143)		$3.857
Producing cost per ton		3.345
Administrative and miscellaneous cost per ton		.512
Funkhouser contract orders	Tons	15,000.00
Orders received from Funkhouser	"	8,122.98
Shortage on contract orders from Funkhouser	"	6,877.02
Contract price on Funkhouser orders		$6.500 per ton
Producing cost		3.345 " "
Loss per ton		$3.155 " "
Loss account failure to take contracted material, 6,877.02 tons @ $3.155 per ton		$21,697.00

[fol. 46]

EXHIBIT "D"

1926

Cost of Production

Granville, N. Y.

J. B. Preston Company, Inc.

Quarrying and Milling Cost, Including Labor:		
Quarrying, including labor	$39,687.65	
Milling, including labor	43,906.65	
Trucks and teams	7,742.16	
Light and power	794.92	
Gasoline and storage	449.90	
Compensation insurance	3,242.69	
Auto repairs and supplies	1,266.95	
Freight and express	246.10	
Miscellaneous labor and supplies	1,851.47	
Total		$99,188.49
Administrative and Miscellaneous Expense:		
Fire insurance	$3,902.91	
Demurrage	23.00	
Telephone and telegraph	546.07	
Stationery, printing and postage	63.50	
Traveling	111.59	
Legal expense	8.30	
Advertising	405.73	
Sundry	987.36	
Salaries	8,803.21	
Total		14,851.67
Total cost		$114,040.16

[fol. 47]

Total cost per ton, including overhead (tons produced, 23,256)		$4.904
Producing cost per ton		4.265
Administrative and miscellaneous cost per ton		.639
Funkhouser contract orders	Tons	15,000.000
Orders received from Funkhouser	"	9,727.585
Shortage on contract orders from Funkhouser	"	5,272.415
Contract price on Funkhouser orders		$6.500 per ton
Producing cost		4.265 " "
Loss per ton		$2.235 " "
Loss account failure to take contracted material, 5,272.415 tons @ $2.235 per ton		$11,783.85

[fols. 48 & 49]

EXHIBIT "E"

Summary

J. B. Preston Company, Inc.

Exhibit "A"—1923	$23,956.84	
Interest to December 31, 1926	4,312.23	
		$28,269.07
Exhibit "B"—1924	$9,334.77	
Interest to December 31, 1926	1,120.18	
		10,454.95

Exhibit "C"—1925	$21,697.00	
Interest to December 31, 1926	1,301.82	
		22,998.82
Exhibit "D"—1926		11,783.85
Total		$73,506.69
Less credit—Supplement Exhibit "B"		3,900.00
Total loss resulting from failure to receive tonnage contracted under Contract Court Exhibit "B"		$69,606.69

[fol. 50] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

CROSS-NOTICE OF APPEAL

SIRS: Please take notice that the above named plaintiff hereby appeals to the Court of Appeals from so much and such part of the order of the Appellate Division of the Supreme Court, First Judicial Department, bearing date April 22, 1932, and entered herein in the office of the Clerk of the said Appellate Division on the 29th day of April, 1932, as modifies the judgment heretofore entered in the office of the Clerk of the County of New York, on the 12th day of May, 1930, by striking out the allowance of interest in the sum of $14,417.57, and also from the judgment as modified and entered herein on the 29th day of April, 1932, striking out the allowance of interest in the sum of $14,417.57; and plaintiff does not appeal from any other part of said order and judgment.

Dated New York, June 14th, 1932.

Yours, &c., Jeremiah A. O'Leary, Attorney for Plaintiff-Appellant-Respondent. Office & P. O. address: No. 220 Broadway, New York, N. Y.

[fol. 51] To McKercher & Link, Esqs., Attorneys for Defendants-Appellants. Office & P. O. Address: No. 17 John Street, New York City, and Daniel E. Finn, Esq., Clerk of New York County.

In Supreme Court of New York, New York County

J. B. Preston Company, Inc., Plaintiff,

against

Raymond J. Funkhouser and Elmer N. Funkhouser, Doing Business under the Firm Name and Style of R. J. Funkhouser and Company, Defendants

Judgment of Modification and Affirmance

The above-named defendants having appealed to the Appellate Division of the Supreme Court for the First Department, from the judgment entered herein in the office of the Clerk of the County of New York, on the 12th day of May, 1930, in favor of the plaintiff and against the defendants for [fol. 52] the sum of Sixty Thousand Six Hundred Eighty-seven and 27/100 ($60,687.27) Dollars, and the said appeal having been heard, and the said Appellate Division having rendered its decision that the judgment be modified by striking out the allowance of interest and as so modified affirmed, and a certified copy of the order of the Appellate Division having been duly filed together with the record on appeal in the office of the Clerk of the County of New York, it is, on motion of Jeremiah A. O'Leary, attorney for the said plaintiff,

Ordered and adjudged that the said judgment in the above entitled action in favor of the plaintiff and against the defendants entered in the New York County Clerk's Office on the 12th day of May, 1930, for the sum of Sixty Thousand Six Hundred Eighty-seven and 27/100 ($60,687.27) Dollars, be and the same is hereby modified by striking out the allowance of Fourteen Thousand Four Hundred Seventeen and 57/100 ($14,417.57) Dollars as interest, and as so modified, the said judgment be and the same is hereby in all things affirmed.

Judgment signed and entered this 29th day of April, 1932.

Daniel E. Finn, Clerk.

[fol. 53] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

J. B. PRESTON COMPANY, INC., Plaintiff-Respondent,
against
RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants-Appellants

ORDER OF MODIFICATION AND AFFIRMANCE—April 22, 1932

An appeal having been taken to this Court by the defendants-appellants, Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, above-named, from the judgment of the Supreme Court, New York County, entered in the Clerk's Office of the County of New York, on the 12th day of May, 1930, in favor of the plaintiff and against the defendants for the sum of Sixty Thousand Six Hundred Eighty-seven and 27/100 ($60,687.27) Dollars, and the said [fol. 54] appeal having been argued by Mr. George Link, Jr., of Counsel for the appellants and by Mr. Jeremiah A. O'Leary, of Counsel for the respondent, and due deliberation having been had thereon, it is hereby unanimously

Ordered that the judgment be modified by striking out the allowance of $14,417.57 as interest and as so modified affirmed.

Enter.

E. R. F.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, JANUARY, 1932

8258

J. B. PRESTON COMPANY, INC., Respondent,
against
RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, Doing Business, etc., Appellants

Appeal by the Defendants from a Judgment of the Supreme Court, New York County, Directed by the Court, in Favor of the Plaintiff in the Sum of $60,687.27

Edward E. Finch, P. J.; John V. McAvoy, Francis Martin, James O'Malley, JJ.

[fol. 55] George Link, Jr., of counsel (Clark McKercher with him on the brief; McKercher & Link, Attorneys) for appellants.

Jeremiah A. O'Leary for respondent.

OPINION—April 22, 1932

MARTIN, J.:

The plaintiff, a domestic corporation, has, since 1922, been engaged in the business of quarrying and selling red slate granules to the roofing industry. The defendants are co-partners conducting a similar business. Under a contract covering the years 1923 to 1926, inclusive, the plaintiff agreed to sell to the defendants 15,000 tons of red slate granules in approximately equal monthly installments, the merchandise to conform to the standard specifications of the roofing industry. The complaint alleges that because of the failure of the defendants to accept delivery the plaintiff was damaged in the sum of $75,874.32. The second cause of action was abandoned during the trial.

The defendants admitted the making of the contract and the failure to accept the total tonnage mentioned therein. By way of affirmative defense they alleged that the plaintiff was unable to deliver the total quantity of slate granules conforming to the standard specifications of the roofing industry and that by reason thereof, they were compelled to purchase this product in the open market, at an increased price of 25 cents per ton, and that as a result of plaintiff's inability to deliver, the defendants were damaged in the sum of $7,030.72. At the trial the defendants waived their demand for an affirmative judgment against the plaintiff. [fol. 56] The defendants, by way of an affirmative defense and counterclaim, alleges that it was agreed between the plaintiff and the defendants that the plaintiff would not sell red slate granules conforming to the standard specifications of the roofing industry direct to the customers of the defendants at a price lower than $7.50 per ton, or at a price lower than that asked by the defendants of its customers, and that, in violation of this agreement, the plaintiff sold slate granules to the customers of the defendants at a price less

than $7.50 per ton and that by reason thereof, the defendants were damaged in the sum of $11,250. The right to affirmative relief on this counterclaim was waived during the progress of the trial.

The defendants also alleged by way of an affirmative defense that during the years 1923-1925 the plaintiff waived all of the provisions of the contract of purchase requiring the defendants to purchase 15,000 tons of red slate granules.

The evidence produced upon the trial established that James B. Preston who was plaintiff's principal witness and who controlled the interests of the plaintiff prior to 1923 had engaged with defendants in other joint ventures relating to the manufacture and sale of green slate roofing granules, and that a controversy arose between Preston individually and the defendants, which was settled on January 23, 1923. The settlement agreement is shown as Exhibit "A." The parties to the agreement were James B. Preston, individually, and the defendants. The plaintiff herein was not a party to the settlement agreement, nor was it mentioned in that agreement, nor is there any evidence in the record that the settlement agreement was ever assigned to the plaintiff. This agreement provided for various substantial cash payments to J. B. Preston, individ-
[fol. 57] ually, and also provided for the assumption by the defendants of various substantial objections of J. B. Preston as an individual, and contained, among other things, the following provisions:

"And in further consideration of these covenants, the Parties of the Second Part agree to execute a contract with the Party of the First Part agreeing to purchase from said Party of the First Part, Fifteen thousand (15,000) tons of red slate granules, in approximately equal monthly shipments, conforming to Standard Specifications of the Roofing Industry, during the year 1923, and a like quantity per year for a period of three (3) years thereafter at a price of Six Dollars and Fifty ($6.50) cents per ton f. o. b. cars Granville, N. Y., terms net. * * *

"The Parties of the Second Part agree to give their moral support to the party of the First Part to the end that he retain his contract with the Philip Carey Company covering Red Slate."

The plaintiff concedes that all of the terms and conditions of the contract with J. B. Preston were fully complied with, including the execution of the contract of sale which is the basis for this action, and which was entered into January 25, 1923, between the plaintiff corporation and the defendants. It makes no reference to the contract of January 23, 1923, between J. B. Preston, as an individual, and the defendants. The respondents contended, however, that the contracts, Exhibit "A" and "B," constituted a single continuous transaction in which the defendants obligated themselves to purchase 60,000 tons of red slate granules at the rate of 15,000 tons a year and that the profits [fol. 58] plaintiff would have made in accordance with the terms of the contract are the damages plaintiff sustained.

The recovery of the plaintiff was based on a breach by the defendants in failing to take the amount of red slate granules contracted for by defendants.

There were several questions of fact, all of which the Court resolved in favor of the plaintiff.

By a stipulation entered into between the parties at the beginning of the trial, a jury was waived. It was agreed that the Court should direct a verdict at the end of the case, and that the "verdict so entered in the minutes shall be deemed to have been rendered by a jury and have the same force and effect as though a jury was present."

The Trial Court, therefore, in conformity with the stipulation, passed upon all the questions of fact involved. An examination of the record convinces us that the direction of a verdict for plaintiff, with the exception of the interest item, was correct. To set forth in detail the evidence in support of the different items is unnecessary and would unduly prolong this opinion.

The conclusion reached by the Trial Court was supported by the evidence. It is clear that the defendants were unable to accept delivery in accordance with the contract and were liable for damages for failure to do so.

In their first point, the appellants contend that the measure of damages is the difference between the contract price and the market value of red slate granules at the time of the breach. The contract price for the red slate granules during 1923-1926 was $6.50 per ton. The prevailing market price during these years was $7.50 per ton. The con-

tract price during the year 1924 on the tonnage not taken [fol. 59] was $6.11 per ton, the market price was $6.62 per ton. The defendants contend, therefore, that the plaintiff has not sustained any damage.

The rule of damages urged by the plaintiff was adopted by the Court. We are of the opinion that the rule so adopted was correct and that the plaintiff was entitled to recover the difference between the cost of producing the granules and the price agreed upon in the contract.

There is another important question involved which requires our consideration. Interest was allowed on unliquidated damages. That this claim was clearly unliquidated appears to be beyond question. Prior to 1927, interest could not be recovered on such a claim. During the year, 1927, a statute was enacted allowing interest on all unliquidated claims. The question arises, however, whether interest may be allowed on such a claim which arose prior to the enactment of that statute.

This question has been the subject of an opinion in the Court of Appeals in so far as it applies to the State of New York (Sweeney v. The State of New York, 251 N. Y. 417). In that case the Court did not decide, however, whether such a statute could be enforced against a defendant other than the State of New York. When the matter was before the Appellate Division, Fourth Department (225 App. Div. 606), that Court held that the portion of the statute which made it compulsory to allow interest on unliquidated claims was not retroactive and did not apply to a claim such as is now before this Court. In a Per Curiam opinion, the Court said:

"The matter of interest allowed involved a substantial [fol. 60] right and not merely a question of procedure. Statutes are presumptively applicable in futuro only. Jacobus v. Colgate, 217 N. Y. 235; Union Pacific R. R. Co. v. Laramie Stockyards Co., 231 U. S. 190.)"

We are of the opinion that the Court erroneously allowed interest on the unliquidated damages and the judgment must be modified by striking out the allowance of interest, and as modified, affirmed.

All concur.

[fol. 61] IN COURT OF APPEALS OF NEW YORK

J. B. PRESTON COMPANY, INC., Plaintiff-Appellant,

against

RAYMOND J. FUNKHOUSER & ANO., Doing Business, etc., Defendants-Appellants

REMITTITUR—March 1, 1933

Be it remembered that on the 27th day of October in the year of our Lord one thousand nine hundred and thirty-two, Raymond J. Funkhouser and another, doing business, etc., the defendant-appellants in this cause, came here unto the Court of Appeals, by McKercher & Link, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And J. B. Preston Company, Inc., the plain-[fol. 62] tiff-appellant in said cause, afterwards appeared in said Court of Appeals by Jeremiah A. O'Leary, its attorney, and also filed a notice of appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Jeremiah A. O'Leary, of counsel for the plaintiff-appellant, and Mr. George Link, Jr., of counsel for the defendants-appellants, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified by restoring the interest disallowed and as so modified affirmed with costs to plaintiff-appellant in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said judgment of Appellate Division be modified, etc., etc. and as so modified affirmed with costs to plaintiff-appellant in this court and in the Appellate Division, as aforesaid.

And hereupon, as well as the Notices of Appeal and return thereto aforesaid, by it given in the premises, are by

the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York. (Seal Court of Appeals, State of New York.)

COURT OF APPEALS

Clerk's Office, Albany

March 1, 1933.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk.

[fol. 63] IN COURT OF APPEALS OF NEW YORK

No. 76

J. B. PRESTON COMPANY, INC., Plaintiff-Respondent-Appellant,

v.

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants-Appellants-Respondents

Cross-appeals from Judgment of Appellate Division, First Department, Modifying and as Modified Affirming a Judgment of Trial Term Entered Upon a Verdict Directed by the Court in Favor of Plaintiff. (Jury Waived.)

Jeremiah A. O'Leary for plaintiff-appellant-respondent.
George Link, Jr., for defendants-appellants-respondents.

OPINION

POUND, Ch. J.:

The question arises in this case of the effect of Section 480 of the Civil Practice Act, as amended by Chapter 623 of the laws of 1927, in effect April 4, 1927, on contracts entered into prior to that date, when at the time of the trial the principal sum is unliquidated.

The section now reads as follows:

"Section 480. Interest to be included in recovery. Where *in any action* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the *total amount* awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the *total amount* awarded, and included in the amount of the judgment. *In every action now pend-* [fol. 64] *ing or hereafter brought wherein any sum of money shall be awarded by verdict, report or decisions upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.*"

The court below has held that so much of the statute as makes it compulsory to allow interest on unliquidated claims cannot apply to a claim for unliquidated damages on a contract entered into before April 4, 1927, as the obligation of such contract would be thereby impaired. (cf. Sweeney v. State, 251 N. Y. 417, modifying 225 App. Div. 606.)

"No state shall * * * pass any * * * law impairing the obligation of contracts." (U. S. Cons. Art. I, Sec. 10.) "A contract is an agreement by which a party undertakes to do or not to do a particular thing." (Ogden v. Saunders, 12 Wheaton 317.) By the obligation of a contract is meant the legal obligation of the parties to adhere to the agreement which at the time of contracting the law recognized and made enforceable. (Ogden v. Saunders, supra.) The question thus resolves itself into this: When

the parties enter into a contract the breach of which results in a claim for unliquidated damages, do the parties make an agreement that no interest shall be charged on the principal sum found due which agreement would be impaired by a later statute which permits the recovery of interest? [fol. 65] (Coombs v. Getz, 285 U. S. 434.)

Earl, J. writing for the court in 1879 in White v. Miller (78 N. Y. 393, 397) discussing the allowance of interest in common law actions, concluded that it was difficult to deduce from the decided cases any certain rule and suggested that "a statute could probably be framed which would produce more certain if not juster results." The rule had not been made certain in 1922 (Blackwell v. Finlay, 233 N. Y. 361) nor has it since been clarified. Prager v. N. J. Fidelity and Plate Glass Ins. Co., 245 N. Y. 1, 7.) A rule of uniformity must be found to enable justice to be done. The tendency is to make interest an incident of the recovery.

In Faber v. New York (222 N. Y. 25, 262) the court said:

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established marked values or other generally recognized standards?"

When the contract in suit was entered into, this was the somewhat vague and indefinite law of the State of New York. It has never been held to be a part of the obligation of the contract that no interest should be allowed on un- [fol. 66] liquidated demands. (Missouri etc. Co. v. Sebastian, 249 U. S. 170, 178.) Interest has been added where the demand has been greatly in excess of the amount determined to be due. (de Carricarti v. Blanco, 121 N. Y. 230; cf. Prager v. Fidelity Co. supra, p. 5.)

The mere fact that the statute is retroactive does not bring it in conflict with the Federal Constitution. (J. C.

Lee v. Texas, 184 U. S. 156, 161-162.) Nor has a person a vested interest in any rule of law entitling him to have the rule remain unaltered. (Truax v. Corrigan, 257 U. S. 312, 348.) Interest is the ordinary incident for the non-payment of obligations and compensation is a fundamental principle of damages. (Prager v. Fidelity Co., supra, p. 6.) Interest must be allowed as an incident to "just compensation" where property has been taken by eminent domain. (U. S. v. Rogers, 255 U. S. 163.) The obligation is the same as to contracts. (Prager v. Fidelity Co., supra.) The party not performing should not deprive the party not in fault of the use of his money without paying therefor. (Prager v. Fidelity Co., supra.)

The amendment to C. P. A. Sec. 480 changes a rule of the common law but it conflicts with no constitutional guarantee. It prevents an escape through procedural difficul- [fol. 67] ties from the real obligation to make full compensation for breach of contract. A claim for damages represents a pecuniary loss which should include interest. The obligation of the contract includes interest. The rule of law was that if the defendant could not determine on any fixed day what was due, no interest could be recoverable because defendant knew not what, if anything, he should pay. That was a rule of convenience, not an agreement to forego interest. The implied obligation of the contract was to pay interest in accordance with the rules of law existing when the case was tried.

Every change in the remedies open to parties to a contract does not constitute an impairment of its obligation. Where the statute deals only with the remedy, the creation of a new and more adequate remedy does not impair the obligation of the contract. (Sackheim v. Pigueron, 215 N. Y. 62.) A debtor has no substantial right to avoid the payment of interest in full. Courts have always had jurisdiction over claims for interest as an incident to damages. It follows that Sec. 480 is a remedial statute to be construed, according to its literal meaning, to apply to all actions brought after it went into effect, irrespective of the time when the cause of action arose. It changes an existing right of action rather than creates a new right. It [fol. 68] vindicates a preexisting right to compensation for breach of contract (Jacobus v. Colgate, 217 N. Y. 235)

which the courts have found it impossible to recognize by reason of difficulties in the way of computing interest.

The judgment should have included the interest allowed by the trial court. Otherwise the decision below seems supported by the evidence and free from legal error.

Judgment of Appellate Division modified by restoring the interest disallowed, and as so modified affirmed with costs in this court and in the Appellate Division.

[fol. 69] IN SUPREME COURT OF NEW YORK

Present: Hon. John F. Carew, Justice.

J. B. PRESTON COMPANY, INC., Plaintiff,

against

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants

ORDER ON REMITTITUR—March 6, 1933

The above named defendants, Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, having appealed to the Court of Appeals of the State of New York from the judgment entered and filed in the office of the Clerk of the County of New York, on the 29th day of April, 1932, whereby it was adjudged that the judgment entered in this action on the 12th day of May, 1930, for the sum of sixty thousand six hundred eighty-seven and 27/100 ($60,687.27) dollars in favor of the plaintiff and against the defendants be modified by striking out the allowance of fourteen thousand four hundred seventeen and 57/100 ($14,417.57) dollars as interest, and as so modified, the said judgment be in all things affirmed, and the plaintiff having cross-appealed to the Court of Appeals of the State of New York from so much and such part of the order of the Appellate Division as modifies the judgment heretofore entered, by striking out the allowance of interest in the sum of fourteen thousand four hundred seventeen and 57/100 [fol. 70] ($14,417.57) dollars; and the said appeal having

been duly argued at the Court of Appeals and after due deliberation, the Court of Appeals having ordered and adjudged that the judgment so appealed from, as aforesaid, be modified by restoring the interest disallowed and as so modified affirmed with costs to plaintiff-appellant in this Court and in the Appellate Division, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law; now on reading the remittitur from the Court of Appeals herein and the notice of motion dated the 4th day of March, 1933, and Jeremiah A. O'Leary, attorney for the plaintiff having appeared on the motion and no one appearing in opposition thereto and the said motion having been granted on default and upon filing the opinion of the court, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Entered.

J. F. Carew, J. S. C.

[fol. 71] In Supreme Court of New York, New York County

J. B. Preston Company, Inc., Plaintiff,

against

Raymond J. Funkhouser and Elmer N. Funkhouser, Doing Business under the Firm Name and Style of R. J. Funkhouser & Company, Defendants

Judgment

A judgment in this action in favor of the plaintiff and against the defendants, Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, having been rendered in this Court on the 12th day of May, 1930, for the sum of sixty thousand six hundred eighty-seven and 27/100 ($60,687.27) dollars; and the defendants having appealed from the said judgment to the Appellate Division of this Court, for the First Judicial Department, and the said judgment having been modified by striking out the allow-

ance of fourteen thousand four hundred seventeen and 57/100 ($14,417.57) dollars as interest, and as modified, in all things affirmed by this Court at said Appellate Division, and the judgment of modification and affirmance having been entered thereon in this Court on the 29th day of April, 1932; and the defendants having appealed therefrom to the Court of Appeals and the plaintiff having cross-appealed to the Court of Appeals from so much and such part of the order of the Appellate Division, as modifies the judgment heretofore entered, by striking out the allowance of interest in the sum of fourteen thousand four hundred seventeen and 57/100 ($14,417.57) dollars; and the said Court of Appeals having sent hither its remittitur, filed herein [fol. 72] on the 4th day of March, 1933, by which it appears that the said Court of Appeals has modified the said judgment by restoring the interest disallowed and as so modified affirmed with costs to the plaintiff-appellant in this court and in the Appellate Division, and has given judgment accordingly, and has remitted the judgment of the said Court of Appeals to this Court to be enforced according to law; and this Court having, by an order duly entered herein on the 6th day of March, 1933, ordered that the said judgment be made the judgment of this Court, and the plaintiff's costs in the Appellate Division and the Court of Appeals having been duly taxed in the sum of $456.86,

Now, on motion of Jeremiah A. O'Leary, attorney for the plaintiff, it is

Adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court, and it is further

Adjudged that the said judgment of the Appellate Division be and the same is hereby modified by restoring the interest disallowed and as so modified affirmed with costs to the plaintiff-appellant in this Court and in the Appellate Division and that the plaintiff, J. B. Preston Company, Inc., recover of the defendants, Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, the further sum of $456.86 costs, as taxed, and that it have execution therefor.

Dated New York, March 7th, 1933.

Daniel E. Finn, Clerk.

[fol. 73] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

The above named defendants-appellants-respondents having prayed for an allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of New York, County of New York, to review and modify a judgment made by said Supreme Court in the above entitled action, said judgment having been modified by the Appellate Division of the Supreme Court of the State of New York, First Department, by striking out the allowance of interest upon the damages assessed, and the judgment of said Appellate Division having been modified by the Court of Appeals on the 3rd day of March, 1933, by restoring the interest disallowed by said Appellate Division, and the record in said cause having been remitted to said Supreme Court, where the same now remains, and having presented their petition for appeal, assignment of errors, prayer for modification, and statement under Rule 12 of the Rules of the United States Supreme Court, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, and it appearing from the said petition and the record in the above entitled cause that there was drawn in question the validity [fol. 74] of Section 480 of the New York Civil Practice Act as amended April 4, 1927, on the ground that such statute impairs the obligation of the contract and deprives the defendants of property without due process of law and is repugnant to the Constitution of the United States and that the decision of this court was in favor of the validity of such statute and that said petition is a proper petition for the issuance of this order, it is

Ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of New York, County of New York, in the cause in which the above mentioned judgment was made and from the judgment of said Supreme Court in said cause as so affirmed by the Court of Appeals of the State of New York insofar as said order and judgment allows and awards interest to the plaintiff-respondent-appellant; and it is further

Ordered, that the Clerk of the Supreme Court of the State of New York, County of New York, within thirty days from this date, make and transmit to the Clerk of the United States Supreme Court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be designated by præcipe filed with him by any of the parties hereto; and it is further

Ordered, that said defendants shall give good and sufficient security, to be approved by the undersigned, in the sum of $20,000 conditioned according to law, and that upon filing said bond, approved as aforesaid, the same shall operate as a supersedeas of so much of said judgment as awards interest and costs on appeal and shall suspend and stay all further proceedings to collect said interest and costs on appeal until the termination of said appeal by the Supreme Court of the United States.

Dated April 8, 1933.

Cuthbert W. Pound, Chief Judge of the Court of Appeals of the State of New York.

[fol. 75] Appellee, J. B. Preston Company, Inc., respectfully excepts to the signing of the foregoing order, both generally and upon the specific ground that no federal question is involved. Exception allowed.

Cuthbert W. Pound, Chief Judge of the Court of Appeals of the State of New York.

Above order consented to as to form only and that the bond be set at $20,000.

Jeremiah A. O'Leary, Attorney for J. B. Preston Company, Inc.

[fol. 76] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

To the Hon. Cuthbert W. Pound, Chief Judge of the Court of Appeals of the State of New York:

The petition of Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser and Company respectfully shows:

1. That on or about the 3rd day of March, 1933, the Court of Appeals of the State of New York made and

entered a final order and judgment in the above entitled action in favor of the plaintiff-respondent-appellant herein and against your petitioners, in which final order and judgment and in the proceedings had in this case certain errors were committed to the prejudice of your petitioners, all of which appear more fully herein below and in the assignment of errors filed in this cause with this petition. That the said Court of Appeals is the highest court of the State of New York in which a decision in this action and [fol. 77] matter could be had.

2. This action was tried at a Trial Term of the Supreme Court, New York County, before Mr. Justice Townley without a jury. The court found that the plaintiff had been damaged in the sum of $45,799.70 and directed judgment thereon with interest on the sum of $20,256.00 from December 31, 1923, on $5,926.00 from December 31, 1924, on $13,770.00 from December 31, 1925, and on $5,837.70 from December 31, 1926.

3. The cause of action arose upon a contract entered into in the year 1923 whereby the defendants agreed to purchase from the plaintiff 15,000 tons of red slate granules in the years 1923, 1924, 1925 and 1926. The plaintiff alleged that the defendants had breached said contract by not taking the full amount of red slate granules called for by said contract during said years, and the case was tried and damages awarded upon the theory that the correct measure of the plaintiff's damages was the difference between the contract price and the cost of manufacture.

4. The defendants duly appealed from said judgment to the Appellate Division of the Supreme Court, First Department, and upon said appeal the defendants urged among other things that the plaintiff was not entitled to interest upon the damages awarded upon the ground that the Amendment to Section 480 of the Civil Practice Act of the State of New York, which became effective April 4, 1927, was unconstitutional so far as said section affected contracts entered into prior to the enactment thereof. It was urged that said statute impaired the obligation of the contract and deprived the defendants of property without due process of law and came within the prohibitions of the Article I, Section 10 and the Fourteenth Amendment of the United States Constitution.

[fol. 78] 5. On or about the 29th day of April, 1932, said Appellate Division modified the judgment of the Trial Court by striking out the allowance of $14,417.57 as interest and as so modified affirmed the said judgment of the said Trial Court.

6. Said defendants thereupon appealed to the Court of Appeals of the State of New York from the aforesaid order of the said Appellate Division in so far as the same affirmed the judgment of the Trial Court, and the plaintiff thereupon appealed to this court by a cross appeal appealing from so much of said order and judgment of said Appellate Division as modified the judgment of the Trial Court in striking out the allowance of said interest. Thereupon a hearing was had in the aforesaid Court of Appeals and the defendants, there, as it had been urged in the court below, maintained that Section 480 of the Civil Practice Act which awarded interest in all contract actions then pending or thereafter brought and whether the damages were theretofore liquidated or unliquidated, was unconstitutional as hereinabove set forth upon the ground that the damages in this action were unliquidated.

7. On or about the 3rd day of March, 1933, the Court of Appeals ordered and adjudged that the judgment so appealed from as aforesaid be modified by restoring the interest disallowed, and as so modified, affirmed the order and judgment of said Appellate Division, and it was further ordered that the record aforesaid and the proceedings be remitted into the Supreme Court of the State of New York, there to be proceeded upon according to law. Thereupon the record and proceedings were duly remitted to the said Supreme Court and on the 6th day of March, 1933, at a Special Term of the Supreme Court of the State of New [fol. 79] York held in and for the County of New York at the Court House in the Borough of Manhattan, City of New York, the said judgment and order of the Court of Appeals was made the judgment and order of the said Supreme Court of the State of New York, and the judgment of the said Trial Court was thereby confirmed.

8. Said record is now with said Supreme Court of the State of New York.

9. Your petitioners contend and allege that the judgment of said Trial Term was illegal and void in so far as interest was allowed the plaintiff and against your petitioners because the said interest was allowed pursuant to Section 480 of the Civil Practice Act as amended April 4, 1927, which, in so far as the same has been held to affect the contract in this case, is violative of the Constitution of the United States in that it violates the rights and obligations of your petitioners in said contract and that it deprives your petitioners of their property without due process of law.

10. Your petitioners state that this is a case provided for by Section 237 of the Judicial Code of the United States in which is involved a final judgment or decree in a suit in the highest court of the State of New York in which a decision in the suit could be had, where is drawn in question the validity of Section 480 of the New York Civil Practice Act as amended April 4, 1927 on the ground that said statute as amended is repugnant to the Constitution of the United States and the decision was in favor of the validity of said statute.

Wherefore, inasmuch as certain errors appear in the order and judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto as [fols. 80 & 81] recited in the annexed assignment of errors and in the petition herein, your petitioners pray for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of New York and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioners may be examined and corrected and said judgment modified, and for an order fixing the amount of the bond thereon, and so your petitioners will ever pray.

No previous application for the relief herein sought has been made to any court or judge.

Raymond J. Funkhouser, Elmer N. Funkhouser.

Duly sworn to by R. J. Funkhouser and E. N. Funkhouser. Jurats omitted in printing.

[fol. 82] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

And now come the defendants herein and respectfully submit that in the record, proceedings, decision and final judgment and order of the Court of Appeals duly remitted to the Supreme Court of the State of New York, County of New York, and made the judgment and order of said Supreme Court of the State of New York on the 6th day of March, 1933, in the above entitled action, there is manifest error in this, to wit:

1. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff under Section 480 of the New York Civil Practice Act as amended April 4, 1927 did not impair the rights and obligations of the defendants under the contract entered into in the year 1923.

2. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff under Section 480 of the New York [fol. 83] Civil Practice Act as amended April 4, 1927 did not deprive the defendants of property without due process of law.

3. The Court of Appeals of the State of New York erred in holding that the awarding of interest upon the damages sustained by the plaintiff was a matter of remedy and not of right.

4. The Court of Appeals of the State of New York erred in holding that Section 480 of the New York Civil Practice Act as amended April 4, 1927 in so far as the same applied to contracts entered into prior to April 4, 1927, did not violate Article I, Section 10, and the Fourteenth amendment thereto, of the Constitution of the United States.

5. The Court of Appeals erred in modifying the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, by restoring interest in the sum of $14,417.57 and as so modified, affirming the judgment of the said Appellate Division and of the Trial Court.

Wherefore the defendants pray that the judgment, order, and decision aforesaid may be reversed, annulled and altogether held for nought in so far as said judgment, order, and decision awards plaintiff interest, that the judgment of the Trial Term of the Supreme Court of the State of New York, County of New York, aforesaid be declared unconstitutional as aforesaid and further that the defendants have such other and further relief as may be just and proper.

Dated March —, 1933.

McKercher & Link, Attorneys for Defendants. Office & P. O. address: 17 John Street, Borough of Manhattan, City of New York.

[fols. 84–88] Citation, in usual form, omitted in printing.

[fols. 89 & 90] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 15, 1933

1. Comes now Raymond J. Funkhouser and Elmer N. Funkhouser doing business under the firm name and style of R. J. Funkhouser & Company the appellants in the above entitled cause and adopt their assignment of errors as the points to be relied upon.

2. Appellants further state that only the following parts of the record, as filed in this court, are deemed necessary to be printed for the consideration of the points above set forth, viz.:

Title of paper	Record folios
(a) Notice of Appeal	Folios 5 and 6.
1. Complaint and exhibits attached thereto	Folios 10 to 42 inclusive.
2. Answer	Folios 43 to 57 inclusive.

Title of paper	Record folios
3. Extract from Clerk's Minutes	Folios 58-A to 59-B inclusive.
4. Judgment of Trial Court	Folios 61 to 63 inclusive.
5. Order Correcting Judgment of Trial Court.	Folios 64 to 66 inclusive.
6. Court's (Trial) Opinion	Folios 3123 to 3143 inclusive.

[fol. 92]

7. Plaintiff's Exhibit 21	Fols. 3481 to 3509 inclusive.
8. Plaintiff's Cross Notice of Appeal to Court of Appeals	Fols. 4240 to 4243 inclusive.
9. Judgment of Modification and Affirmance by Appellate Division.	Fols. 4244 to 4248 inclusive.
10. Order of Modification and Affirmance by Appellate Division	Fols. 4249 to 4252 inclusive.
11. Opinion of Appellate Division	Fols. 4253 to 4270 inclusive.

12. Order of Supreme Court, New York County, making order and judgment of Court of Appeals, the order and judgment of the Supreme Court, New York County.
13. Order and Judgment of the Court of Appeals.
14. Opinion of Court of Appeals.
15. Order and Petition Allowing Appeal to the Supreme Court of the United States.
16. Citation.
17. Statement as to jurisdiction of Supreme Court of the United States.
18. Assignment of errors.
19. This præcipe.

Geo. Link, Jr., Counsel for Appellants. Office & P. O. address: 17 John Street, Borough of Manhattan, City of New York.

To Jeremiah A. O'Leary, Esq., counsel for appellee, office & P. O. address 220 Broadway, New York City.
To Clerk of the Supreme Court of the United States.

[fol. 92a] SIR: Please take notice that the within is a copy of appellants' statement of points to be relied upon and designation of the parts of the record to be printed.

Yours, etc., George Link, Jr., Counsel for Appellant. Office & P. O. address: 17 John Street, New York City.

To Jeremiah A. O'Leary, Esq., counsel for appellee.

Service acknowledged this 3rd day of May, 1933.
Jeremiah A. O'Leary, Counsel for Appellee. Office & P. O. address: 220 Broadway, New York City.

[fol. 92b] [File endorsement omitted.]

[fol. 93] SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 15, 1933

Appellee designates the following parts of the record, filed in this Court, as necessary to be printed for the consideration of points raised on this appeal:

Title of paper	Record folios
1. Plaintiff's Exhibit 17	Folios 3465-9
2. Plaintiff's Exhibit 18	Folios 3469-75
3. Colloquy between counsel	Folios 3114-23
4. This præcipe.	

Jeremiah A. O'Leary, Counsel for Appellee. Office & P. O. address: 220 Broadway, Borough of Manhattan, City of New York.

To McKercher & Link, Esqs., Counsel for Appellants. Office & P. O. address: 17 John Street, New York City.
To Clerk of the Supreme Court of the United States.

[fol. 94] SIR: Please take notice that the within is a copy of appellee's statement of points to be relied upon and designation of the parts of the record to be printed.

Yours, &c., Jeremiah A. O'Leary, Counsel for Appellee. Office & P. O. address: 220 Broadway, Borough of Manhattan, City of New York.

To McKercher & Link, Esqs., Counsel for Appellants.
Service acknowledged this 12th day of May, 1933.
McKercher & Link, Counsel for Appellants. Office & P. O. address: No. 17 John Street, New York, N. Y.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 37,669. New York Supreme Court. Term No. 72. Raymond J. Funkhouser and Elmer N. Funkhouser, doing business under the firm name and style of R. J. Funkhouser & Company, appellants, vs. J. B. Preston Company, Inc. Filed May 15, 1933. No. 72, O. T., 1933.